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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re H.A., a Person Coming Under the  
Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND  
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

S.S.,

Defendant and Appellant.

D074994

(Super. Ct. No. J516289)

APPEAL from an order of the Superior Court of San Diego County, Michael J.

Imhoff, Commissioner. Affirmed.

Rich Pfeiffer, under appointment by the Court of Appeal, for Defendant and  
Appellant.

Thomas E. Montgomery, County Counsel, John E. Philips, Chief Deputy County  
Counsel, and Lisa Maldonado, Deputy County Counsel, for Plaintiff and Respondent.

Valerie N. Lankford, under appointment by the Court of Appeal, for Minor.

S.S. (Mother) appeals an order terminating her parental rights in the juvenile dependency case involving her minor daughter, H.A., following a selection and implementation hearing under Welfare and Institutions Code section 366.26.<sup>1</sup> Mother contends the trial court erred in finding H.A. to be adoptable. Mother argues that evidence presented at the hearing, when combined with events that occurred after the court made its factual findings, suggest that H.A.'s age and "emotional state" make it likely no family would be willing to adopt her. In postbriefing letters, Mother's counsel also challenges the reliability of adoptability evidence presented at the hearing, and urges the matter be reversed and remanded with directions to the court to conduct an evidentiary hearing to address these issues.

H.A.'s appointed appellate counsel agrees the trial court's order should be reversed because posthearing events suggest H.A. will not be placed for adoption. By contrast, H.A.'s *trial* counsel and guardian ad litem argues the trial court's order should be affirmed.

As we shall explain, counsel's arguments directly contradict many of the cardinal rules of appellate review and our high court's admonitions in *In re Zeth S.* (2003) 31 Cal.4th 396 (*Zeth S.*). Applying these principles and having thoroughly reviewed the appellate record, we conclude the juvenile court's order finding H.A. to be adoptable and terminating parental rights is supported by substantial evidence and reflects the court's adherence to the proper procedures. Except for the notice of emergency removal

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<sup>1</sup> All further statutory references are to the Welfare and Institutions Code.

contained in the clerk's transcript, we decline to consider other postjudgment evidence and events challenging the court's order. The dependency statutes specifically address how to proceed in the circumstances that have occurred here and we have full confidence the trial court will ensure H.A.'s best interests are protected. Accordingly, we affirm.

### FACTUAL AND PROCEDURAL SUMMARY

The current petition was the third dependency petition filed regarding H.A. The San Diego County Health and Human Services Agency (the Agency) filed the first petition immediately after H.A.'s birth when Mother tested positive for methamphetamines and admitted she used drugs just prior to H.A.'s birth. Eighteen months later, H.A. was returned to Mother and jurisdiction was terminated six months thereafter.

When H.A. was five years old, police stopped Mother while she was driving under the influence of a controlled substance with H.A. in the car. Mother initially accepted an offer of voluntary services, but then failed to participate and was later arrested again for driving unsafely with H.A. The Agency filed the second petition and H.A. was ultimately placed with Mother's new wife, who was given presumed mother status after Mother's reunification services were terminated. By the time H.A. was placed with her presumed mother, Mother was incarcerated.

In November 2015, only nine months after jurisdiction was terminated following the second petition, the Agency petitioned the juvenile court under section 300, subdivision (c), on behalf of then-nine-year-old H.A. The Agency alleged that H.A. had a mental/emotional disorder, which required mental health treatment, and the parents had

failed to provide the necessary treatment. At the time, H.A. was still living with her presumed mother. The presumed mother had called the police after H.A. hit a three-year-old child, assaulted the adults in the room, and began breaking objects. The presumed mother told a social worker that she was scared of H.A. and wanted her placed in a group home. At that time, Mother was still incarcerated and the social worker was unable to locate H.A.'s father.

The juvenile court found the Agency had made an adequate showing that H.A. was a person described by section 300, subdivision (c), and ordered that she be detained in out-of-home care. At H.A.'s jurisdiction and disposition hearing in February 2016, the court sustained the allegations of the petition under section 300, subdivision (c). The court removed H.A. from the parents' custody and placed her in the home of her father's girlfriend. The court directed that H.A.'s father be provided with reunification services. The presumed mother could not be located, but the court ordered that she also be provided services if she came forward. The court ordered that Mother be denied reunification services, finding services would be detrimental to H.A. Mother was still incarcerated.

Two months later, H.A.'s caregiver gave notice that she could no longer care for her. The Agency filed a section 387 petition to change H.A.'s placement, leading to her eventual placement in a foster home. During her time in the foster home with specialized services, H.A. made "significant progress," with minimal behavioral issues.

In advance of the 12-month review hearing, the Agency recommended that the court terminate Father's reunification services. Following a drug relapse, Father failed to

comply with any services and was out of contact with the Agency until he indicated in a phone call that he wished his parental rights to be terminated. Mother was still incarcerated and the presumed mother's whereabouts were unknown.

In February 2017, the juvenile court terminated all reunification services and continued H.A.'s placement in the foster home. A few months later, H.A. was placed with her maternal aunt, who was potentially interested in adopting H.A. but wanted to see a period of stability before starting the adoption process. At that time, the Agency was providing services to H.A. and her aunt, including mental health services for H.A. and skills training for both H.A. and her aunt.

In January 2018, the juvenile court granted the Agency's request to schedule a selection and implementation hearing under section 366.26.

In an initial assessment report, the social worker explained there were a number of families approved for adoption who had indicated a willingness to adopt a child with specific characteristics. In the case of H.A., the placement coordinator identified families that expressed a willingness to adopt a child with H.A.'s characteristics, listed as "family history of substance abuse and mental health, . . . age; ethnicity; gender; aggressive behaviors; past psychiatric hospitalization and diagnoses that include mood disorder NOS and bipolar; medical history . . . ; school difficulties; attachment difficulties." The initial report identified 14 families in San Diego County willing to adopt a child with H.A.'s background and characteristics.

The Agency also saw no substantive detriment to H.A. if parental rights were terminated. Mother had some intermittent contact with H.A., but was still incarcerated.

Her father had previously indicated he wanted to give up his parental rights and by the time of the section 366.26 hearing, he had not had any contact with H.A. in the previous two and one-half years. The presumed mother had disappeared shortly after H.A. was taken to the hospital at the initiation of this dependency proceeding.

The Agency also presented evidence that H.A. was specifically adoptable by her aunt, who was interested in adopting H.A. and was completing the process of being approved for adoption with "no known impediments to her being approved." The aunt, however, expressed she did not want to "feel rushed" and wanted to spend more time with H.A. in her house before committing to adoption as a final placement. On this basis, the Agency requested, and the court granted, a continuation of the section 366.26 hearing. Because the parents indicated they intended to contest the termination of parental rights, the court set the matter for a trial.

In a supplemental report filed before the continued hearing, the Agency presented additional evidence that H.A. was adoptable. Primarily, it presented evidence that H.A. was specifically adoptable by her aunt, who was interested in adopting H.A. and was "on track" to being approved for adoption, and H.A. expressed that she wanted to be adopted. An adoptions placement coordinator also identified "20 possible families approved to adopt that are interested in a child with [H.A.]'s characteristics."

At the section 366.26 hearing, Mother waived her right to appear or participate in the hearing; Father was not present but was represented by counsel. The court received the Agency's reports into evidence with no objection by the parents. Parents declined to cross-examine the social worker and offered no evidence or testimony in rebuttal.

Minor's counsel agreed with the Agency's recommendation, stating that "it's pretty clear from the evidence before the Court and the report [H.A.] really wishes to be adopted."

Mother's counsel indicated that Mother had instructed her to "submit on the report" and also informed the court that "[Mother] is in agreement with whatever [H.A.] wants in the permanent plan. [H.A.] has been very clear that she wants to be adopted and does not want to continue having contact." Father also instructed his counsel to submit on the report.

The court found "by clear and convincing evidence that [H.A.] is likely to be adopted." The court relied on the aunt as a prospective adoptive parent and also found, "should for whatever reason the current caretaker be unable to finalize the adoption, . . . that there are some 20 approved, identified, available, prospective adoptive homes that would be willing to adopt a child with [H.A.'s] characteristics, including her emotional issues. The Court therefore concludes that she is both specifically and generally adoptable."

The court also found that the termination of the parental rights of all three parents would not be detrimental to H.A. because none of the exceptions under section 366.26, subdivision (c)(1)(B) applied. It noted that any benefit to H.A. by maintaining contact with her parents "is greatly outweighed by the need for stability in placement which can only be achieved through adoptive placement." It therefore terminated parental rights and selected adoption as H.A.'s permanent plan.

Approximately one month after the hearing, the appellate record reflects that the Agency filed a Notice of Emergency Removal pursuant to section 366.26, subdivision

(n)(4), stating that it removed H.A. from her aunt's house after an incident occurred resulting in the police transporting H.A. to the hospital. The aunt called the police while H.A. was having "an aggressive and destructive outburst." The Agency explained that hospital staff had informed the aunt that H.A. did not meet the criteria for admission, but aunt would not pick her up. The notice of emergency removal also indicated H.A. did not want to return to her aunt's home, but was still interested in being adopted.<sup>2</sup>

Mother filed a timely notice of appeal from the order terminating her parental rights. Thereafter, Mother filed her opening brief, the Agency filed its respondent's brief, and Mother filed her reply brief. At the request of Minor's trial counsel, this court appointed appellate counsel for H.A. who filed a letter brief on H.A.'s behalf, arguing the trial court's order should be reversed.

That brief triggered a flurry of unsolicited supplemental letter briefs. H.A.'s *trial* counsel criticized Minor's appellate counsel's position and stated that after this court appointed counsel for H.A., H.A. asked to have the adoption order affirmed and trial counsel communicated this information to Minor's appellate counsel. Mother's counsel then responded with letters, reiterating the order should be reversed and stating that the attorneys had tentatively agreed to a stipulated reversal. Counsel also maintained that, at the disposition hearing, the Agency misrepresented the availability of prospective adoptive homes; argued the Agency routinely makes such misrepresentations; and asked

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<sup>2</sup> In a letter brief, Mother's counsel alleges that he was told the Agency terminated the intensive services being provided to H.A. and her aunt following the section 366.26 hearing. The appellate record sheds no light on this issue.



this court "to remand the matter for an evidentiary hearing to see what is really going on." Except for one of Mother's counsel's letters, none of the other letters were submitted under penalty of perjury and none of the letters cited to the record on appeal.

## DISCUSSION

### I.

" 'Once reunification services are ordered terminated, the focus shifts to the needs of the child for permanency and stability.' [Citation.] 'A section 366.26 hearing . . . is a hearing specifically designed to select and implement a permanent plan for the child.' [Citation.] It is designed to protect children's 'compelling rights . . . to have a placement that is stable, permanent, and that allows the caretaker to make a full emotional commitment to the child.' [Citation.] 'The Legislature has declared that California has an interest in providing stable, permanent homes for children who have been removed from parental custody and for whom reunification efforts with their parents have been unsuccessful.' " (*In re Celine R.* (2003) 31 Cal.4th 45, 52-53 (*Celine R.*).

"Whenever the court finds 'that it is likely the child will be adopted, the court shall terminate parental rights and order the child placed for adoption.' [Citation.] The circumstance that the court has terminated reunification services provides 'a sufficient basis for termination of parental rights unless the court finds a compelling reason for determining that termination would be detrimental to the child due to one or more' of specified circumstances. [Citation.] The Legislature has thus determined that, where possible, adoption is the first choice. 'Adoption is the Legislature's first choice because it

gives the child the best chance at [a full] emotional commitment from a responsible caretaker.' " (*Celine R.*, *supra*, 31 Cal.4th at p. 53.)

"We thus see that if the child is adoptable . . . adoption is the norm. Indeed, the court must order adoption and its necessary consequence, termination of parental rights, unless one of the specified circumstances provides a compelling reason for finding that termination of parental rights would be detrimental to the child. The specified statutory circumstances—actually, *exceptions* to the general rule that the court must choose adoption where possible—'must be considered in view of the legislative preference for adoption when reunification efforts have failed.' [Citation.] At this stage of the dependency proceedings, 'it becomes inimical to the interests of the minor to heavily burden efforts to place the child in a permanent alternative home.' [Citation.] The statutory exceptions merely permit the court, in *exceptional circumstances* [citation], to choose an option other than the norm, which remains adoption." (*Celine R.*, *supra*, 31 Cal.4th at p. 53.)

On appeal, Mother does not rely on specific statutory exceptions to support her claim that the court erred in terminating her parental rights. Instead, Mother argues the Agency's report is not sufficient evidence to support the court's finding that H.A. is generally adoptable and the court failed to consider other relevant evidence suggesting that H.A. is not adoptable. Relying on the fact that H.A. was removed from her aunt's care after the section 366.26 hearing, Mother also maintains the trial court erred in finding H.A. to be *specifically* adoptable.

"When reviewing a court's finding a minor is adoptable, we apply the substantial evidence test. [Citations.] If, on the entire record, there is substantial evidence to support the findings of the juvenile court, we must uphold those findings. We do not pass on the credibility of witnesses, attempt to resolve conflicts in the evidence or weigh the evidence. [Citations.] Rather, our task is to determine whether there is substantial evidence from which a reasonable trier of fact could find, by clear and convincing evidence, that the minor is adoptable. [Citation.] The appellant has the burden of showing there is no evidence of a sufficiently substantial nature to support the finding or order." (*In re R.C.* (2008) 169 Cal.App.4th 486, 491 (*R.C.*).)

Moreover, any potential disruption in a specific adoption plan is not a basis for reversal when additional evidence supports the court's finding that the minor is generally adoptable. "For a minor . . . who is adoptable based on factors in addition to a caregiver's willingness to adopt, the suitability or availability of the caregiver to adopt is not a relevant inquiry. [Citations.] Rather, a caregiver's willingness to adopt serves as further evidence the minor is likely to be adopted within a reasonable time either by the caregiver 'or by some other family.' " (*R.C., supra*, 169 Cal.App.4th at pp. 493-494.) The selection and implementation hearing is not the proper forum for parents to contest the suitability of a prospective adoptive family, which is a question reserved for a subsequent adoption proceeding. (*Id.* at p. 494.) Similarly, whether a child is certain to be adopted is not the relevant test. On appeal, our review is limited to determining whether substantial evidence exists to support the juvenile court's finding that the minor is *likely* to be adopted.

Substantial evidence supports the trial court's finding H.A. was generally and specifically adoptable. Here, the social worker's assessment report identified "20 possible families approved to adopt that are interested in a child with [H.A.]'s characteristics." The social worker explained that these families expressed a willingness to adopt a child like H.A. with her specific characteristics, listed as "family history of substance abuse and mental health, . . . age; ethnicity; gender; aggressive behaviors; past psychiatric hospitalization and diagnoses that include mood disorder NOS and bipolar; medical history . . . ; school difficulties; attachment difficulties."

Both parents submitted on this report and waived their right to cross-examine the social worker regarding the veracity of this statement. They also declined to offer any evidence or testimony to suggest H.A. is not adoptable. Accordingly, the juvenile court properly relied on the Agency's report, along with other evidence in the record, to find that H.A. was generally adoptable. Additionally, as this court discussed in *R.C.*, evidence that H.A.'s aunt was willing to adopt her at the time of the section 366.26 hearing supports the court's finding that another family would likely adopt H.A. even if the relationship between the aunt and H.A. fell apart after the hearing.

The record also supports the conclusion that H.A. is interested in being adopted and does not oppose the termination of parental rights. In an addendum to the social worker's report prepared shortly before the hearing, the social worker reported that H.A. had expressed that she is not interested in having a relationship with her parents. It also stated that, at the time, "her caregiver wants to adopt, and [H.A.] wants to be adopted." At the hearing, Mother's counsel noted that Mother did not oppose termination of her

rights and stated that "[H.A.] has been very clear she wants to be adopted and does not want to continue having contact." H.A.'s counsel stated that she thought "it's pretty clear from the evidence before the Court and the report she really wishes to be adopted." Even after H.A. was removed from her aunt's care after the section 366.26 hearing, the notice of emergency removal indicates H.A. expressed that although she did not wish to return to her aunt's care at that time, she "is still interested in being adopted."

To rebut this evidence, Mother relies on unsworn statements contained in her reply brief and in subsequent letter briefs to suggest that the Agency misrepresented that 20 possible prospective families exist. Minor's appellate counsel and trial counsel also rely on unsworn statements about posthearing events to support their arguments concerning the proper outcome of this appeal.

Our consideration of these briefs and arguments in this appeal are guided by our Supreme Court's decision in *Zeth S.*, *supra*, 31 Cal.4th 396, in which the court similarly reviewed an order terminating parental rights and the trial court's finding the minor was likely to be adopted by his current caretaker, his grandfather. (*Id.* at p. 402.)

In *Zeth S.*, the mother's appellate counsel submitted a letter brief, in which she "indicated she had investigated the minor's current circumstances and learned that the minor was doing well in the home of the maternal grandfather, that mother visited regularly and often spent the night, that during her visits mother assumed primary parental responsibility for the minor, and that '[a]ccording to the grandfather, he felt pressure to adopt [the minor] and preferred to become [the minor's] legal guardian.' " (*Zeth S.*, *supra*, 31 Cal.4th at p. 403.) Relying on these posthearing statements, the

mother argued that termination of her parental rights was not in the minor's best interests. (*Id.* at pp. 403-404.)

The appellate court agreed and reversed the order terminating parental rights. The Supreme Court reversed, concluding that except in exceptional circumstances, a reviewing court may *not* consider such evidence to support a reversal of a judgment terminating parental rights.

The court explained that even when an appellate court considers such evidence with the best of intentions, this approach "effectively substitutes the reviewing court's own post hoc determination of whether termination of parental rights remains in the minor's best interests for the legislatively mandated determination that follows when the comprehensive juvenile dependency statutory scheme is dutifully adhered to in the trial court. The Legislature, however, has determined that what is in the child's best interests is best realized through implementation of the procedures, presumptions, and timelines written into the dependency statutes. The statutory scheme does not authorize a reviewing court to substitute its own judgment as to what is in the child's best interests for the trial court's determination in that regard, reached pursuant to the statutory scheme's comprehensive and controlling provisions. This is particularly true where the reviewing court reaches a contrary determination on the basis of postjudgment evidence outside the record on appeal, which evidence, in likelihood, would have been irrelevant and excludable had it been known and presented to the trial court in the first instance." (*Zeth S.*, *supra*, 31 Cal.4th at pp. 409-401, fn. omitted.)

The *Zeth S.* court cautioned appellate courts to avoid the tendency to consider postjudgment evidence, and reiterated that juvenile dependency proceedings are not exempt from the general rule that an appellate court is tasked with reviewing the correctness of a trial court's judgment or order at the time of its rendition on the record of evidence before that court. (*Zeth S.*, *supra*, 31 Cal.4th at p. 405.) As the court explained, the orderly administration of justice requires that the parties present their evidentiary disputes to the juvenile court at the selection and implementation hearing to allow the court to make the necessary factual findings. (*Ibid.*) Other than in rare and exceptional circumstances, appellate courts should maintain their faith in this system and decline to consider, as a basis for reversal, unsworn statements made in appellate filings not before the juvenile court. (*Id.* at p. 400.)

In contravention of our high court's admonition, Mother's counsel and minor's appellate counsel rely primarily on postjudgment events in attempting to undermine the trial court's findings and also ignore the fact the juvenile court offered all parties the opportunity to cross-examine the social worker, call their own witnesses, and submit evidence to be considered by the court at the section 366.26 hearing. Both parents waived these rights and submitted the matter on the social worker's report. The juvenile court then properly considered the unchallenged evidence before it and reached a finding that H.A. was adoptable.

We heed the words of the Supreme Court in *Zeth S.* and decline to hold that the juvenile court erred in terminating parental rights on the basis of evidence not before it. Despite the letters submitted on appeal, this is not an exceptional case warranting a

departure from the well-established rules for appellate review. The Legislature anticipated that juvenile dependency proceedings will involve shifting circumstances and conflicting interests. In anticipation of these difficulties, the Legislature accordingly created a statutory scheme that requires frequent review hearings at all stages of a dependency proceeding. All parties are provided with opportunities to cross-examine the social worker and other individuals involved in the case, and present their own evidence. The statutory scheme also permits the parties multiple opportunities to seek appellate relief.

Even after a termination of parental rights, the Legislature established other avenues for modifying existing orders. Section 366.3 expressly states that the juvenile court retains jurisdiction over a minor found to be adoptable after parental rights are terminated, and requires the court to review the minor's status every six months following a report by the Agency discussing the efforts to place the minor with an adoptive family. (*Id.*, subd. (g).) As part of this process, the Agency must identify and attempt to address any impediments to adoption and the court may make orders to assist in the placement of the minor for adoption. (*Id.*, subd. (g)(9) & (12).) Moreover, if, after three years, a minor is ultimately found to be unadoptable despite the best efforts of all involved, the court may reinstate parental rights and modify the permanent plan pursuant to section 388. (§ 366.26, subd. (i)(3).) Contrary to counsel's argument, the trial court's findings do not place H.A. at risk of being trapped in a nonbeneficial placement or becoming a legal orphan.



These statutory provisions ensure the focus remains on finding a permanent home for a minor even after an order terminating parental rights. Thus, the claims and accusations raised in the letter briefs filed in this appeal concerning H.A.'s adoptability can be raised at these postpermanency planning review hearings and addressed in evidentiary hearings.<sup>3</sup>

In affirming the trial court's order, we do not intend to ignore the serious allegations raised in the letter briefs. Rather, we are reaffirming the Supreme Court's holding that the juvenile dependency statutory scheme provides a robust procedure for considering the interests of parents, minors, and the petitioning agency. We adhere to our high court's conclusion that these procedures are undermined if the parties are permitted to raise new issues on appeal based on new assertions of questionable admissibility as a basis for asking the appellate court to reconsider the factual conclusions of the juvenile court.

Finding no error under the proper scope of appellate review, there is no basis for reversal.

#### DISPOSITION

The order is affirmed.

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<sup>3</sup> Following the filing of the letter briefs, the Agency filed a motion to augment the record on appeal with postpermanency planning reports filed in anticipation of a review hearing, a copy of the reporter's transcript for that hearing, and the juvenile court's minute order from that hearing. The Agency suggests that these documents support the correctness of the order terminating parental rights by demonstrating that H.A. remains on track to be adopted. As discussed above, we follow the holding of *Zeth S.* and decline to consider postjudgment evidence to support the correctness of the juvenile court's ruling. Accordingly, the motion to augment is denied.

HALLER, J.

WE CONCUR:

HUFFMAN, Acting P. J.

DATO, J.